

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RICHARD KENDALL,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting

Commissioner of Social Security,

Defendant.

No. CV-14-332-JPH

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 17, 18, and plaintiff's reply. ECF No. 19. The parties have consented to proceed before a magistrate judge. ECF No. 9. After reviewing the administrative record and the parties' briefs, the court **grants** plaintiff's motion for summary judgment, **ECF No. 17**, and remands for further administrative proceedings.

JURISDICTION

Plaintiff applied for disability insurance benefits (DIB) and supplemental security income (SSI) benefits in May 2011, alleging onset beginning November 2, 2009 (Tr. 198-206). Benefits were denied initially and on reconsideration (Tr. 125-40). Administrative Law Judge (ALJ) R.J. Payne held hearings July 8, 2013 and February 3, 2014. Psychological expert Donna Veraldi, Ph.D., and Kendall testified (Tr. 18-39, 42-67). February 13, 2014 ALJ Payne issued an unfavorable decision (Tr. 111-20). The Appeals Council denied review August 15, 2014 (Tr. 1-6). October 7, 2014, Kendall filed this action for judicial review pursuant to 42

1 U.S.C. § 405(g). ECF No. 1, 7.

2 **STATEMENT OF FACTS**

3 The facts have been presented in the administrative hearing transcript, the
4 decision of the ALJ and the parties' briefs. They are only briefly summarized as
5 necessary to explain the court's decision.

6 Plaintiff was 59 years old at onset. He has fourteen years of education. He
7 testified he was terminated in 2009 from his last job "on a technicality" (sending
8 an improper email) but felt the biggest reason was that he "didn't get along with
9 people there and there were people that were afraid of me. And I think it was just
10 pressure, that they decided I, I didn't fit there anymore." This job, as an
11 engineering technician in the public works department of the city of Wenatchee,
12 lasted about ten years. Before he was terminated, when he had problems with his
13 supervisor, Kendall would "just go home." Prior to this job, he worked for the state
14 of Alaska as an engineer for nine or twelve years. He alleges disability based on
15 mental limitations. He has taken psychotropic medication for depression and
16 ADHD for many years. He is not in mental health therapy, other than annual
17 medication checks, because he lacks insurance (Tr. 21-26, 47, 76, 287, 295, 307).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Social Security Act (the Act) defines disability as the "inability to
15 engage in any substantial gainful activity by reason of any medically determinable
16 physical or mental impairment which can be expected to result in death or which
17 has lasted or can be expected to last for a continuous period of not less than twelve
18 months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
19 plaintiff shall be determined to be under a disability only if any impairments are of
such severity that a plaintiff is not only unable to do previous work but cannot,
considering plaintiff's age, education and work experiences, engage in any other
substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423

1 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
2 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
(9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
5 one determines if the person is engaged in substantial gainful activities. If so,
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
7 decision maker proceeds to step two, which determines whether plaintiff has a
8 medically severe impairment or combination of impairments. 20 C.F.R. §§
404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment
or combination of impairments, the disability claim is denied.

9 If the impairment is severe, the evaluation proceeds to the third step, which
10 compares plaintiff's impairment with a number of listed impairments
11 acknowledged by the Commissioner to be so severe as to preclude substantial
12 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
§404 Subpt. P App. 1. If the impairment meets or equals one of the listed
13 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
14 not one conclusively presumed to be disabling, the evaluation proceeds to the
15 fourth step, which determines whether the impairment prevents plaintiff from
16 performing work which was performed in the past. If a plaintiff is able to perform
17 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
18 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
19 final step in the process determines whether plaintiff is able to perform other work
in the national economy in view of plaintiff's residual functional capacity, age,
education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
 2 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
 3 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 4 met once plaintiff establishes that a physical or mental impairment prevents the
 5 performance of previous work. The burden then shifts, at step five, to the
 6 Commissioner to show that (1) plaintiff can perform other substantial gainful
 7 activity and (2) a “significant number of jobs exist in the national economy” which
 8 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
 9 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the
 10 Commissioner’s decision, made through an ALJ, when the determination is not
 11 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
 12 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 13 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be
 14 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
 15 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g). Substantial
 16 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 17 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
 18 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence
 19 as a reasonable mind might accept as adequate to support a conclusion.”
Richardson v. Perales, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch
 inferences and conclusions as the [Commissioner] may reasonably draw from the
 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
 1965). On review, the Court considers the record as a whole, not just the evidence
 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980).

1 It is the role of the trier of fact, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence
7 and making the decision. *Browner v. Secretary of Health and Human Services*,
8 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support
9 the administrative findings, or if there is conflicting evidence that will support a
10 finding of either disability or nondisability, the finding of the Commissioner is
11 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

12 ALJ'S FINDINGS

13 ALJ Payne found plaintiff was insured through December 31, 2014 (Tr. 111,
14 113). At step one he found Kendall did not work at SGA levels after he applied for
15 benefits (Tr. 113). At step two, he found plaintiff has medically determinable
16 impairments, but does not have an impairment or combination that is severe (Tr.
17 113). The ALJ found Kendall less than fully credible (Tr. 115). The ALJ
18 concluded Kendall was not disabled from onset, November 2, 2009, through date
19 of the decision, February 13, 2014 (Tr. 120).

ISSUES

20 Kendall alleges the ALJ failed to properly weight the opinions of examining
21 and non-examining sources, resulting in error at step two. ECF No. 17 at 1. The
22 Commissioner responds that the ALJ applied the correct legal standards and the
23 decision is supported by substantial evidence. She asks the court to affirm. ECF
24 No. 18 at 2.

DISCUSSION

A. *Weighing opinion evidence*

1 Kendall alleges the ALJ should have given more credit to the June 2013 and
2 January 2014 opinions of Dr. Hopfenbeck, an examining psychiatrist. ECF No. 17
3 at 7-15, referring to Tr. 116-19, 305-10, 328-34. The Commissioner responds that
4 the ALJ's reasons are specific, legitimate and supported by substantial evidence.
ECF No. 18 at 2, 4-16.

5 The ALJ considered several opinions, addressed here in chronological order.

6 *Dr. O'Donnell*

7 The ALJ considered the November 2009 opinion of treating doctor
8 Theodore O'Donnell, M.D. (Tr. 116, 282-83, 288 (noting O'Donnell is Kendall's
9 primary care provider), 326-27)). Dr. O'Donnell indicates Kendall complained of
10 depression, conflicts with his supervisor on the job, and said he was about to be
11 terminated. The ALJ points out "Dr. O'Donnell noted depressed mood, affect was
12 flat and sad, with no evidence of significant suicide, risk or thought disorder. He
13 diagnosed depression, major with recent exacerbation, but suggested no limitations
14 associated with the claimant's condition." (Tr. 116). The ALJ's summary omits
significant detail, including Kendall's concern he will be "blackballed" as a civil
engineer in his community due to his age and being fired; he cries; is distracted,
indecisive and anxious, and has significant insomnia (Tr. 282). The ALJ notes in
July 2012 Dr. O'Donnell assessed "depression, persistent, no immediate risk for
suicide" (Tr. 117).

15 *Dr. Rowe*

16 The ALJ considered the July 21, 2011 opinion of examining psychologist
17 Thomas Rowe, Ph.D. (Tr. 116, referring to Tr. 286-93). Dr. Rowe administered
18 testing and opined Kendall "presents with at least a moderate level of depression"
19 (Tr. 291). He diagnosed major depressive disorder, recurrent; dysthymia; cannabis
abuse [smokes at least once a week] and rule out attention deficit hyperactivity
disorder (ADHD). He opined cannabis use is certainly not indicated, given his

1 mood disorder (Tr. 290). He recommended psychotherapeutic treatment in addition
2 to medication (Tr. 291). The ALJ characterizes this opinion as revealing “generally
mild psychological symptoms.” (Tr. 116).

3 *Dr. Palermo*

4 The ALJ considered the evaluation by Jennifer Palermo, Ph.D., performed
about five months later, on December 6, 2011. (Tr. 116, referring to Tr. 294-98).
5 She also diagnosed major depressive disorder, recurrent, moderate; dysthymia,
6 cannabis abuse per prior records and r/o ADHD, predominantly inattentive type
(Tr. 297). She assessed a GAF of 55, opined prognosis is “fair” but opined Kendall
7 is capable of performing a least simple repetitive tasks in a work environment (Tr.
8 297-98). The ALJ purports to give great this opinion great weight “due to the
9 consistency with objective evidence of very mild psychological abnormalities” (Tr.
116).

10 *Dr. Hopfenbeck*

11 The ALJ considered the opinion of psychiatrist James Hopfenbeck, M.D.,
who evaluated Kendall June 20, 2013, a few weeks before the hearing (Tr. 116-18,
12 referring to Tr. 305-10). [After the hearing, on January 12, 2014, Dr. Hopfenbeck
13 reviewed and commented on Dr. Veraldi’s opinion. Tr. 328-34.] Like the other
14 evaluators, he notes Kendall’s mood was depressed and his affect restricted (Tr.
308). On Axis I, he diagnosed major depression, severe, recurrent and post-
15 traumatic stress disorder. On Axis II he notes antisocial personality traits related to
16 extreme self-isolating but no diagnosis. He assessed a GAF of 42 and described
Kendall as “severely depressed.” He opined Kendall’s severe mental health
17 impairments prevent him from working (Tr. 308, 310). The ALJ rejected this
18 opinion as inconsistent with other treating and evaluating sources who
19 “documented very mild psychological abnormalities” (Tr. 117).

The record does not support the ALJ’s reason. Moreover, Dr. Hopfenbeck

1 notes Kendall's condition appeared to have worsened from prior evaluations, a
2 logical reason his conclusions as to the severity of limitations differed. As noted,
the other sources did not document very mild psychological abnormalities.

3 The ALJ's additional reasons are likewise erroneous or unsupported by the
4 record. The timing of the evaluation does not mean the conclusions should be
5 rejected. Nor does the psychiatrist's sympathy for Kendall likely play any role
6 given that Dr. Hofenbeck evaluated Kendall but is not a treating source. The
evidence similarly does not suggest the doctor relied primarily on Kendall's
7 subjective reports.

Dr. Veraldi

8 The ALJ considered the opinion of testifying expert Donna Veraldi, Ph.D.,
9 who reviewed the record (Tr. 118, referring to Tr. 43-67, 311-23). She opined
Kendall suffers from the medically determinable impairments of depressive
10 disorder, dysthymia and cannabis abuse. She opined Kendall has no severe mental
11 impairment.

12 The ALJ considered and gave some weight to the December 30, 2011,
opinion of agency reviewing psychologist James Bailey, Ph.D. (Tr. 118-19,
13 referring to Tr. 88-97, 98-107).

14 Dr. Veraldi's opinion that Kendall's impairments are not severe is not
supported by the record. Every source who evaluated him found at least moderate
15 impairment. Dr. Veraldi appears to rely on the lack of ongoing mental health
16 counseling or treatment in finding no severe impairments. However, as discussed
below, it appears she should not have relied on this reason alone. The ALJ clearly
17 erred by favoring the opinions of reviewing sources over those of examining
18 sources. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

B. Credibility

19 To aid in weighing the conflicting medical evidence, the ALJ evaluated

1 Kendall's credibility. Credibility determinations bear on evaluations of medical
2 evidence when an ALJ is presented with conflicting medical opinions or
inconsistency between a claimant's subjective complaints and diagnosed condition.
3 *See Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of the
4 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039
(9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent
5 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
6 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's
7 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
Cir. 1995).

8 The ALJ's reasons are not clear, convincing and supported by the record.

9 Drug seeking behavior may be evidence of "a tendency to exaggerate pain."
10 *See Edlund v. Massanari*, 253 F. 3d 1152, 1157 (9th Cir. 2001), but Kendall
11 admitted he smokes marijuana. This is not drug seeking behavior, nor does it
12 impugn credibility because Kendall was truthful. The ALJ erred by relying on this
reason.

13 The ALJ relied on the lack of objective medical evidence supporting the
14 severity of alleged symptoms. This is a misreading of the record. Treating and
15 examining sources opined otherwise. *See e.g.*, Tr. 326 (April 2013, Dr. O'Donnell:
at some risk for suicide).

16 The ALJ relied on the lack treatment. An inadequately explained or
17 unexplained failure to seek treatment may impugn credibility. *See Burch v.*
18 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005)(lack of consistent treatment is a factor
19 the ALJ may properly consider). Here, however, Kendall testified he had no
medical insurance. At one point he told Dr. O'Donnell he could no longer afford
adderall, a medication prescribed for ADHD, and a less expensive alternative was
prescribed (Tr. 24-25, 55, 290, 296, 326-27). Moreover, Kendall's failure seek

1 ongoing mental health treatment does not serve to discredit his testimony. “[I]t is a
2 questionable practice to chastise one with a mental impairment for the exercise of
3 poor judgment in seeking rehabilitation.” *Nguyen v. Chater*, 100 F. 3d 1462, 1465
4 (9th Cir. 1991)(internal quotation marks omitted). Kendall’s extremely limited daily
5 activities similarly support rather than impugn his credibility. The ALJ also
6 appears to have completely ignored Kendall’s very strong work history, which
7 enhances credibility. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
8 2002)(ALJ may consider [claimant’s] work record)(internal citation omitted).

9 Considered together, the ALJ’s reasons for finding Kendall not credible do
10 not rise to the level of clear and convincing. As such, his adverse credibility
11 finding was not supported by substantial evidence.

12 *C. Step two*

13 A diagnosis may establish a medically determinable impairment, but does
14 not alone establish an impairment is severe. An impairment or combination of
15 impairments may be found “not severe only if the evidence establishes a slight
16 abnormality that has no more than a minimal effect on an individual’s ability to
17 work.” *Webb. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005)(citing *Smolen v. Chater*,
18 80 F.3d 1273, 1290 (9th Cir. 1996)(internal quotation marks omitted). Step two is a
19 “de minimis screening device [used] to dispose of groundless claims,” and an ALJ
may find that a claimant lacks a medically severe impairment or combination of
impairments only when his conclusion is “clearly established by medical
evidence.” *Webb*, 433 F. 3d a 687, citing *Smolen*, 80 F.3d at 1290; S.S.R. 85-28.

20 The record here includes evidence of problems sufficient to pass the de
21 minimis threshold of step two. Kendall appeared not to have showered and had
22 several days’ growth of beard and dwells on suicide (Tr. 308-09). Unable to make
23 house payments and lost his house; called suicide prevention line a week ago (Tr.
24 326).

1 The ALJ should have found Kendall suffers from severe impairments, that
2 is, impairments that have more a minimal effect on the ability to work. Kendall
3 alleges that, had the opinions of nearly all of the medical sources been properly
4 credited, the ALJ would have found he suffers from severe impairments and would
not have ended the analysis at step two. ECF No. 17 at 7-17.

Kendall is correct.

5 The ALJ erred when he weighed the evidence and error at step two is clearly
6 harmful when the ALJ's analysis ends at step two and there is evidence a claimant,
7 as here, suffers severe impairments.

CONCLUSION

8 After review the Court finds the ALJ's decision is not supported by
9 substantial evidence and contains harmful legal error.

IT IS ORDERED:

10 1. Plaintiff's motion for summary judgment, **ECF No. 17**, is **granted**. The
11 matter is reversed and remanded for further administrative proceedings pursuant to
12 42 U.S.C. §405(g), sentence four.

2. Defendant's motion for summary judgment, ECF No. 18, is denied.

13 The District Executive is directed to file this Order, provide copies to
14 counsel, enter judgment in favor of plaintiff, and **CLOSE** the file.

DATED this 27th day of April, 2015.

s/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE